

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
November 18, 2008 Session

STATE OF TENNESSEE v. HAROLD WAYNE NICHOLS

Direct Appeal from the Criminal Court for Hamilton County
Nos. 175423, 175425, 175438, 175433, 175440, 175442,
175490, 175492, 175495, 175497, 178087, 180535-180537
Jon Kerry Blackwood, Judge

No. E2008-00169-CCA-R3-CD - Filed August 27, 2009

Following post-conviction review, Defendant, Harold Wayne Nichols, was granted a new sentencing hearing in case nos. 175423, 175425, 175438, 175433, 175440, 175442, 175490, 175492, 175495, 175497, 178087, 180535, 180536, and 180537. Prior to the resentencing hearing, Defendant filed a motion to dismiss the charges in these cases. Defendant argued that the delay in remanding these cases for sentencing violated his Sixth Amendment right to a speedy trial. The trial court denied Defendant's motion to dismiss and sentenced him as a Range II, multiple offender, to an effective sentence of twenty-five years. On appeal, Defendant argues that the trial court erred in denying his motion to dismiss. After a thorough review, we affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Affirmed

THOMAS T. WOODALL, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and ROBERT W. WEDEMEYER, JJ., joined.

Ardena J. Garth, District Public Defender; Mary Ann Green, Assistant Public Defender; and Karla Gothard, Assistant Public Defender, for the appellant, Harold Wayne Nichols.

Robert E. Cooper, Jr., Attorney General and Reporter; Mark A. Fulks, Assistant Attorney General; William H. Cox, III, District Attorney General; Rodney C. Strong, Assistant District Attorney General; Jason Thomas, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Procedural Background

In order to understand the issues raised in the case sub judice, it is necessary to summarize the procedural history involving not only the convictions which are the subject of this appeal, but also Defendant's conviction of first degree felony murder for which Defendant was sentenced to

death. In 1988 and 1989, a series of crimes, including aggravated rape, were committed against several women in the Chattanooga area. On September 30, 1988, Defendant broke into the home of Karen Pulley, raped her, and repeatedly struck her in the head with a board. Ms. Pulley died the following day as a result of the blunt trauma to her head. See Nichols v. State, 90 S.W.3d 576, 583 (Tenn. 2002). On January 5, 1989, police officers arrested Defendant after receiving information connecting Defendant to the commission of numerous other unrelated crimes. After his arrest, Defendant confessed to committing several rapes against different victims in December 1988 and early January 1989. Upon further questioning by the investigating officers, Defendant also confessed to the rape and murder of Ms. Pulley. Id. (Other than Ms. Pulley, the victims of the offenses will be referred to by their initials.)

The cases which are the subject of this appeal involve Defendant's convictions of numerous counts of aggravated rape, first degree burglary, and petit larceny against victims P.G., T.R., P.R., and S.T. Defendant entered pleas of guilty to the offenses against T.R. and S.T., and no appeal was filed. Defendant was convicted of the offenses against P.R. and P.G. following a jury trial. These convictions were affirmed by this Court on appeal. State v. Nichols, No. 03C01-9108-CR-00236, 1995 WL 755957 (Tenn. Crim. App., at Knoxville, December 19, 1995), no perm. to appeal filed.

After his convictions for the offenses against P.G., P.R., T.R., and S.T., Defendant entered pleas of guilty to charges of felony murder, aggravated rape, and first degree burglary for the offenses against Ms. Pulley. During the sentencing phase, the State sought the death penalty based on the fact that Defendant had prior convictions for felonies involving violence. See T.C.A. § 39-13-204(i)(2) (1988). The State introduced Defendant's convictions for aggravated rape against T.R., S.T., P.G., and P.R. in case nos. 180537, 175495, 175438, 178087, and 175433 (hereinafter referred to as the "noncapital cases"), as well as Defendant's videotaped confession to the rape and murder of Ms. Pulley. See Nichols, 90 S.W.3d at 584. At the conclusion of the sentencing hearing, the jury imposed a sentence of death which was affirmed on appeal. State v. Nichols, 877 S.W.2d 722 (Tenn. 1994) (hereinafter referred to as the "capital case"). After his capital murder trial, Defendant also entered pleas of guilty to rape or attempted rape charges involving five more victims, T.M., T.H., D.L., A.P., and C.B., and no appeals were taken. Defendant received an aggregate, effective sentence of 225 years for these convictions which are not part of this appeal.

Defendant filed a petition for post-conviction relief in the capital case in April 1995. Defendant filed petitions for post-conviction relief in the noncapital cases in December 1995. The post-conviction court combined the capital case and the noncapital cases for purposes of the evidentiary hearing. The post-conviction court denied relief in the capital case, and granted partial relief in the noncapital cases by ordering new sentencing hearings in these cases. The post-conviction court found that the sentencing in the noncapital cases did not follow the procedures outlined in State v. Pearson, 858 S.W.2d 879 (Tenn. 1993) and State v. Blouvet, 944 S.W.2d 111 (Tenn. 1995). See Nichols, 90 SW.3d at 586 n.4. The State did not appeal the grant of new sentencing hearings, and the denial of Defendant's other claims for post-conviction relief in his capital and noncapital cases were upheld on appeal by our supreme court on October 7, 2002. Id. at 608.

In 2003, Defendant sought federal habeas corpus relief for both his capital case and his noncapital cases. On October 21, 2004, the federal district court dismissed without prejudice Defendant's petitions for habeas corpus review of his noncapital cases. The court found that because Defendant had not been resentenced in these cases, he did not meet the "in custody" requirement for federal habeas corpus relief. On July 25, 2006, the federal district court granted the State's motion for summary judgment as to the habeas corpus petition filed in the capital case. Nichols v. Bell, 440 F. Supp. 2d 730 (E.D. Tenn. 2006).

On May 11, 2007, the trial court conducted a status hearing on the noncapital cases, at which time the public defender's office asked to be appointed to represent Defendant in his resentencing hearings, and counsel was appointed on May 15, 2007. At Defendant's request, the trial court set a second status hearing on July 30, 2007. On that date, Defendant's counsel informed the trial court that she needed sufficient time to prepare a motion in connection with the sentencing hearing, and the parties agreed to a hearing date of September 21, 2007. On August 23, 2007, Defendant filed a motion requesting that his convictions in the noncapital cases be dismissed because the delay in resentencing had violated his constitutional right to a speedy trial. The September hearing date was apparently continued, and the trial court denied Defendant's motion to dismiss on December 17, 2007, finding that:

the length [of delay] ha[s] been inordinate in this matter. However, I can't say from the record that I've read that the reason for the delay was for the prosecution, either Federal or State, to gain a tactical advantage. If the Federal prosecutors were premature, certainly the State in their filings, the State should not be punished for that. The Court has also to understand these are all non-capital offenses for which he is now waiting sentences. There are 225 years of other sentences that are not attacked that he has been properly sentenced on. So the motion to dismiss will be overruled.

The trial court sentenced Defendant to the minimum sentence in the sentence range for each offense. The trial court ordered Defendant to serve his sentences concurrently, for an effective sentence of twenty-five years.

Defendant does not challenge the trial court's sentencing determinations on appeal. Defendant argues, however, that the delay in resentencing him in the noncapital cases violated his Sixth Amendment right to a speedy trial. The State submits first that Defendant has failed to introduce any evidence in support of his speedy trial claims. See Young v. Barrow, 130 S.W.3d 59, 67 (Tenn. Ct. App. 2003) (finding that "an appeal in which the reviewing court's ability to address the issues raised is undermined by the appellant's failure to provide an adequate record is deemed frivolous because it has no reasonable chance of succeeding"). Further, the State argues that an accused does not have a constitutional right to a speedy trial in a resentencing hearing awarded after post-conviction review. Alternatively, the State contends that Defendant has failed to show that he was prejudiced by the delay in resentencing.

II. Inadequate Record

Attached to Defendant's motion to dismiss and included in the technical record on appeal are voluminous certified documents pertaining to both the capital and noncapital cases upon which Defendant relied in presenting his speedy trial challenge. Apparently, these documents were not entered into evidence as exhibits during the hearing on Defendant's motion to dismiss. It is clear from the record, however, that the trial court reviewed and considered these documents in denying Defendant's motion. As our supreme court recently instructed:

any matter that the trial court has appropriately considered is properly includable in the appellate record pursuant to Rule 24(g) of the Tennessee Rules of Appellate Procedure when the matter is "necessary to convey a fair, accurate and complete account of what transpired in the trial court with respect to those issues that are the bases of appeal."

State v. Smotherman, 201 S.W.3d 657, 661 (quoting [State v.] Housler, 167 S.W.3d [294], 298 [Tenn. 2005]; citing [State v.] Bobadilla, 181 S.W.3d [641], 644 [Tenn. 2005]). Accordingly, we conclude that the certified documents attached to Defendant's motion to dismiss were properly includable in the appellate record and, therefore, may be considered upon appellate review.

III. Speedy Trial Challenge

Once the state initiates criminal proceedings, the right to a speedy trial is implicated pursuant to the Sixth Amendment to the United States Constitution and to article 1, section 9 of the Tennessee Constitution. The right to a speedy trial in criminal prosecutions is also statutory in Tennessee. T.C.A. § 40-14-101. In Barker v. Wingo, 407 U.S. 514, 530, 92 S. Ct. 2182, 2192 (1972), the Supreme Court identified three interests which the right to a speedy trial was meant to protect: (1) the prevention of oppressive pre-trial incarceration; (2) the minimization of anxiety and concern of the accused; and (3) limiting the possible impairment of the defense. See also Doggett v. U.S., 505 U.S. 647, 654, 112 S. Ct. 2686, 2692 (1992); State v. Utley, 956 S.W.2d 489, 492 (Tenn. 1997). "Of these forms of prejudice, 'the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system.'" Doggett, 505 U.S. at 654, 112 S. Ct. at 2692 (quoting Barker, 407 U.S., at 532, 92 S. Ct., at 2193).

The State first submits that an accused's right to a speedy trial has never been explicitly applied to a resentencing hearing granted after post-conviction review by either our courts or the United States Supreme Court. The State argues that such proceedings do not trigger a defendant's speedy trial rights because none of the concerns caused by a delay in a trial are present when a conviction has been obtained and the defendant is merely waiting to learn the length of his sentence. That is, the post-conviction petitioner, whose conviction has been upheld on appeal, is not suffering from "oppressive pre-trial incarceration" or anxiety and concern over unresolved criminal charges, and the risk is minimal that evidence will be lost upon resentencing. See Barker, 407 U.S. at 530, 92 S. Ct. at 2192.

In Pollard v. United States, 352 U.S. 354, 361, 77 S. Ct. 481-485-86 (1957), the Supreme Court assumed “arguendo” that sentencing is part of the trial for purposes of Sixth Amendment speedy trial protection. In that case, the defendant entered a plea of guilty in 1952 to embezzlement and left the courtroom before his sentence was imposed. Id. at 355, 77 S. Ct. at 482. Before the trial court adjourned, the prosecutor brought the omission to the trial court’s attention, and the trial court sentenced the defendant to probation after his release from an unrelated sentence. Id. at 356, 77 S. Ct. at 483. Because the sentence was imposed after the defendant had left the courtroom, it was void. Id. The defendant learned of his probationary sentence from prison officials and began reporting to the federal probation officer when he was release from state prison. In 1954, the defendant was brought before the trial court on charges that he had violated the terms of his probation. The trial court set aside the original 1952 judgment and sentenced the defendant to two years imprisonment. Id. at 357, 77 S. Ct. at 483. In his appeal, the defendant argued that his Sixth Amendment right to a speedy trial had been violated. Id. at 359, 77 S. Ct. at 484. In addressing the defendant’s speedy trial challenge, the Supreme Court assumed “arguendo” that sentencing is part of the trial for purposes of the Sixth Amendment. Id. at 361, 77 S. Ct. at 486. The Supreme Court affirmed the sentence and held that the trial court promptly corrected its error and that any delay was not “purposeful or oppressive.” Id. at 361-62, 77 S. Ct. at 486.

Since Pollard, many federal and state courts, including Tennessee, have concluded that sentencing is within the protective ambit of the Sixth Amendment’s right to a speedy trial. State v. Davis, 238 S.W.3d 330, 337 (Tenn. Crim. App. 2005) (concluding that “the right to a speedy trial encompasses the sentencing proceedings in a criminal prosecution”); State v. Joseph Hart a.k.a. Albert Cross, No. 02C01-9902-CC-00075, 1999 WL 737780, at *2 (Tenn. Crim. App., at Jackson, Sept. 20, 1999); see also Perez v. Sullivan, 793 F.2d 249, 252-53 (10th Cir. 1986) (citing numerous federal and state cases reaching similar conclusion); but see United States v. Sanders, 452 F.3d 572, 580 (6th Cir. 2006) (declining to extend speedy trial rights to a sentencing procedure and applying instead a procedural due process analysis); State v. Johnson, 353 So. 2d 458 (La. 1978).

A resentencing hearing, like a sentencing hearing, is a continuation of the accused’s criminal prosecution. Generally, states which apply a speedy trial analysis to delays in sentencing following conviction also apply the same analysis to delays in resentencing following appellate review. See e.g. Gonzales v. State, 582 P.2d 630 (Alaska 1978), superceded by statute on other grounds as recognized in Linn v. State, 658 P.2d 140, 141 (Alaska Ct. App. 1983) (finding no speedy trial violations in thirty-nine month delay in resentencing after appellate review); State v. Avery, 383 S.E.2d 224 (N.C. Ct. App. 1989) (concluding that Barker v. Wingo factors apply equally to delays in resentencing but finding no prejudice in thirty-month delay); City of Euclid v. Brackis, 735 N.E.2d 511 (Ohio Ct. App. 1999) (twenty-two month delay between appellate remand and resentencing violated right to a speedy trial); State v. Modest, 24 P.3d 1116 (Wash. Ct. App. 2001) (finding no speedy trial violation in two-year delay in resentencing after appellate review).

Whatever concerns may arise in the context of a sentencing delay following conviction may also arise when a delay occurs in resentencing. A delay under either scenario, for example, may cause undue or oppressive incarceration. As the State argues, however, the concerns identified in

Barker tend to diminish or even disappear after a valid conviction. Nonetheless, the lessening of the Barker concerns in the context of a sentencing or resentencing proceeding does not eliminate a defendant's constitutional right to a speedy trial but, rather, speaks to the difficulty a defendant may face in establishing any prejudice from a sentencing delay. As the Perez court observed:

[o]bviously a delay in sentencing involves considerations different from those related to pre-trial delay. The alteration of [a] defendant's status from accused and presumed innocent to guilty and awaiting sentence is a significant change which must be taken into account in the balancing process. Once guilt has been established in the first instance the balance between the interests of the individual and those of society shift proportionately. . . In fact, it might be said that once a defendant has been convicted it would be the rarest of circumstances in which the right to a speedy trial could be infringed without a showing of prejudice. . . Because the rights of society proportionately increase, the prejudice claimed by the defendant must be substantial and demonstrable.

Perez, 793 F. 2d at 254-56.

Based on the foregoing, we will consider Defendant's speedy trial challenge to his resentencing hearing.

A. Length of Delay

Under Barker, the following factors are considered in determining whether an accused's right to a speedy trial was violated: (1) the length of the delay, (2) the reasons for the delay, (3) the assertion of the right, and (4) the prejudice to the defendant in light of the facts and circumstances of the particular case. Barker, 407 U.S. at 530-32, 92 S. Ct. at 2192-93; see also State v. Bishop, 493 S.W.2d 81, 84-85 (Tenn. 1973) (implicitly adopting the Barker balancing test for our state's constitutional and statutory right to a speedy trial). All four factors are to be balanced in light of the facts and circumstances of the case. Barker, 407 U.S. at 533, 92 S. Ct. at 2193.

The first Barker factor, length of delay, is a threshold factor, serving as the triggering mechanism that will necessitate consideration of the other three factors. Barker, 407 U.S. at 530. "Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." Id. Generally, "a delay must approach one year to trigger the Barker v. Wingo analysis," although "the line of demarcation depends on the nature of the case." Utey, 956 S.W.2d at 494; see Doggett, 505 U.S. at 652 n. 1, 112 S. Ct. at 2691 n. 1. On appeal, the trial court's determinations as to speedy trial violations are reviewed for abuse of discretion. Davis, 238 S.W.3d at 387 (citing State v. Jefferson, 938 S.W.2d 1 (Tenn. Crim. App. 1996)).

Defendant submits that the length of delay is nine years based on his contention that the delay period for speedy trial analysis began in 1998 after the State decided not to appeal the post-conviction's grant of a resentencing hearing in the noncapital cases. The State argues, however, and

we agree, that the delay period commenced upon the conclusion of the appellate review of Defendant's other post-conviction issues on October 7, 2002.

Although the State did not appeal the post-conviction court's sentencing determinations, other issues were presented for review. See Nichols, 90 S.W.3d at 582. Once an appeal is perfected, the jurisdiction of the appellate court attaches, and it retains jurisdiction over the case until its mandate returns the case to the trial court. State v. Pendergrass, 937 S.W.2d 834, 837 (Tenn. 1996). "These principles keep cases together during the appellate process and prevent undesirable consequences of permitting a case to be pending in more than one court at the same time." First American Trust Co. v. Franklin-Murray Development Co., L.P., 59 S.W.3d 135, 141 (Tenn. Ct. App. 2001) (citing Spence v. Allstate Ins. Co., 883 S.W.2d 586, 596 (Tenn. 1994)). Thus, despite the State's decision to forego appellate review of the sentencing issue, the trial court lacked authority to act on the noncapital cases during the appellate process, and the "trigger" date for the Barker v. Wingo analysis is thus October 7, 2002, when the case was remanded to the trial court for resentencing.

At the resentencing hearing, the State explained that Defendant, on November 7, 2002, filed a petition for post-conviction relief regarding DNA analysis of the physical evidence associated with his capital case and one of the noncapital cases. The trial court dismissed without prejudice Defendant's motion for DNA testing as to the noncapital case. The results of the DNA analysis in the capital case ultimately provided corroboration of Defendant's involvement in the offenses committed against Ms. Pulley, and the trial court denied Defendant's petition for post-conviction relief on February 8, 2006. The State then filed a motion requesting that the trial court schedule Defendant's resentencing hearing on April 10, 2006. The State contends that the delay between April 10, 2006, and December 17, 2007, when the resentencing hearing was held, was caused by Defendant's repeated requests for continuances. The State submits, therefore, that the delay was approximately three years and six months.

At the resentencing hearing, Defendant acknowledged that the State initiated resentencing proceedings in April 2006, and the resentencing hearing was set for July 6, 2006. Defense counsel stated that she asked for a continuance because she had not yet been appointed to represent Defendant. Despite the fact that defense counsel represented Defendant at the post-conviction hearing and on appeal, and no motion to withdraw as counsel is reflected in the record, defense counsel explained that the public defender's office nonetheless required a re-appointment for the proceedings following remand. Defense counsel stated that she requested the July continuance in order to secure the appointment which was not forthcoming until May 2007. The record reflects that the delay between May 2007 and December 2007 was the result of Defendant's request for continuances. See State v. Wood, 924 S.W.2d 342, 347 (Tenn. 1996) (observing that a delay caused, or acquiesced in, by the defendant is weighed against the defendant).

Nonetheless, the delay between our supreme court's remand to the trial court in October 2002, and the State's initiation of resentencing proceedings in 2006 is sufficient for us to evaluate the remaining three Barker factors.

B. Assertion of Right

As Defendant argues, he does not have a duty to bring himself to trial. Barker, 407 U.S. at 521, 531-32. Nonetheless, the timeliness of the demand for a speedy trial is a factor to be considered when determining whether the defendant has been denied his speedy trial right. State v. Simmons, 54 S.W.3d 755, 760 (Tenn. 2001); State v. Bishop, 493 S.W.2d 81, 84 (Tenn. 1973). The assertion of the speedy trial right is “entitled to strong evidentiary weight” in the analysis, particularly since in some situations, prolonged delays may actually benefit the defendant. Barker, 407 U.S. at 521, 531-32.

As reflected in the record, Defendant first asserted his constitutional right to a speedy trial on August 23, 2007, when he filed his motion to dismiss the noncapital convictions. Although Defendant submits that he was without counsel in the State proceedings from 2001 until May 15, 2007, when the public defender’s office was reappointed to represent him in the resentencing hearing, there is nothing in the record to indicate that Defendant actively sought resentencing on the noncapital cases. See State v. Tambora Simmons, No. 03C01-9905-CR-00188, 2000 WL 190230, at *3 (Tenn. Crim. App., at Knoxville, Feb. 16, 2000), perm. to appeal denied (Tenn. Sept. 18, 2000) (Although the defendant argued that he did not assert his right to a speedy trial because he was not represented by counsel, a panel of this Court noted “that there was opportunity for the Defendant to assert his right or file a motion to dismiss because of a speedy trial violation after the indictment but before the trial, which he did not do.”).

We have previously concluded that a pro se motion asserting a speedy trial right was sufficient to satisfy this factor of the Barker analysis. See e.g. State v. Stephen Massey, No. M2001-02686-CCA-R3-CD, 2003 WL 21250850, at *6 (Tenn. Crim. App., at Nashville, May 30, 2003), no perm. to appeal filed; State v. Willie Johnson, No. W2001-02929-CCA-R3-CD, 2003 WL 141045, at *12 (Tenn. Crim. App., at Jackson, Jan. 14, 2003), perm. to appeal denied (Tenn. July 7, 2003). A defendant’s letter sent to opposing counsel is also sufficient to constitute an assertion of the right to speedy trial. State v. Monty Earl Picklesimer, No. M2003-03087-CCA-R3-CD, 2004 WL 2683743, at *1 (Tenn. Crim. App., at Nashville, Nov. 24, 2004), no perm. to appeal filed. Even a vague request for a more timely trial that does not explicitly mention the Sixth Amendment guarantee or the desire for a speedy trial is sufficient to be considered an assertion of the right. State v. Easterly, 77 S.W.3d 226, 237 (Tenn. Crim. App. 2001).

Defendant argues that counsel representing him in his pursuit of federal habeas corpus relief “repeatedly tried to ameliorate” the prejudice caused by the delay in resentencing by filing federal habeas corpus petitions in the noncapital cases despite concerns with “finality,” and by requesting a postponement of the evidentiary hearing on the capital case’s habeas corpus petition. However, regardless of the proceedings in federal court, Defendant did not assert his right to a speedy trial in state court until May 2007. Thus we conclude that this factor weighs in favor of the State.

C. Reason for Delay

Regarding the second factor, reason for delay, our supreme court has noted that for purposes of speedy trial analysis, trial delays can be categorized as follows:

- (a) Intentional delay to gain a tactical advantage over the defense or delay designed to harass the defendant;
- (b) Bureaucratic indifference or negligence;
- (c) Delay necessary to the fair and effective prosecution of the case; and
- (d) Delay caused, or acquiesced in, by the defense.

Wood, 924 S.W.2d at 346-47.

Defendant argues that the State intentionally delayed the resentencing proceedings in order to gain a tactical advantage over Defendant's ability to collaterally attack both his capital and noncapital convictions in federal court. Defendant submits that "there can also be no question the State of Tennessee knew its prosecution of [Defendant] was incomplete." For example, Defendant points out that on October 22, 2004, the State was sent an electronic copy of the federal district court's order dismissing without prejudice Defendant's petitions for habeas corpus relief in the noncapital cases. Defendant contends that the State then used the delay in resentencing to its advantage when it successfully opposed Defendant's motion to postpone the evidentiary hearing on the federal habeas corpus petition in his capital case.

Defendant also points to a portion of the transcript of a hearing on November 29, 2005, which was apparently conducted by the district court in connection with Defendant's scheduling motion in the capital case. The district court questioned the State about the status of the noncapital cases. The State responded:

I had checked into that with the DA's office and I was told they checked with the clerk's office, and they were told that it was, I'm assuming now it would have been post-conviction counsel for the petitioner, when it went back on remand they asked that it be moved off of the docket, for some reason it ha[s] never been put back on the docket, and they told me they were going to check into that. That's the last that I've heard, as far as I know they're still pending resentencing.

At most, this exchange points to a finding that the delay was caused by either negligence or bureaucratic indifference on the part of the State. Defendant contends, however, that the State intentionally delayed resentencing in the noncapital cases to gain a tactical advantage over him. In support of his argument, Defendant points out that the federal district court, in reviewing the habeas corpus petition filed in the capital case, (1) refused to consider issues regarding the effectiveness of

trial counsel's assistance in the noncapital cases; and (2) denied Defendant relief based on a claim presented under the Supreme Court's holding in Rompilla v. Beard, 545 U.S. 374, 393, 125 S. Ct. 2456, 2469 (2005).

In his capital case habeas corpus petition, Defendant challenged the effectiveness of trial counsel's assistance in the noncapital cases based on trial counsel's failure to provide information to the T.B.I.'s serologist in the T.R. case; to investigate alibi evidence in the T.M. case; to sufficiently question the physical evidence presented in the S.T. case, and to challenge the validity of his confessions in the S.T. and T.R. cases.

As for these issues, the district court found:

[t]his claim is not cognizable in this habeas proceeding because it attacks counsel's performance in cases not before this Court. When a conviction is legally flawed, counsel should seek to have it set aside. However, this is not the proper forum for petitioner to attack counsel's performance in relation to a conviction being used as an aggravating circumstance.

Nichols, 440 F. Supp. 2d at 777. The district court additionally found that in order to "challenge counsel's performance during the state court proceedings in the [noncapital cases], petitioner must file a habeas petition pursuant to 28 U.S.C. § 2254 in [those cases]." Id. at 764.

Defendant concedes in his brief that he may file federal habeas corpus petitions in the noncapital cases as soon as the state appellate review over his resentencing is concluded, which presumably will include those issues which he attempted to collaterally raise in the capital case habeas corpus petition.

Defendant contends, however, that "those future filings [in the noncapital cases] will not relieve the prejudice suffered by [Defendant's] loss of having his Rompilla claim reviewed in his capital case." Defendant surmises that if he attempts to present his Rompilla claim in federal court, the State "would likely argue" that the claim is barred as an impermissible successive petition.

In Rompilla, the United States Supreme Court held that the failure of capital counsel, who did not represent the defendant on his prior felony charges, to examine the public files pertaining to the defendant's prior felony convictions when the prosecutor made it known that it intended to use that record at the capital sentencing hearing constituted ineffective assistance of counsel. Rompilla, 545 U.S. at 393, 125 S. Ct. at 2469. The problem Defendant faced, however, was not his inability to present a Rompilla challenge in his capital habeas corpus petition, but the fact that his case is distinguishable from the situation presented in Rompilla. As the district court found:

petitioner's assertion that this Court may properly review whether trial counsel engaged in an adequate investigation of evidence supporting the aggravating circumstance is worded in such a way so as to obfuscate petitioner's actual claim.

Petitioner's actual claim is an attack on trial counsel's performance (alleged ineffective performance for advising petitioner to plead guilty in the S.T. and T.R. cases prior to petitioner being evaluated by his court authorized psychologist) in handling the underlying convictions which were used by the State as aggravating circumstances to support the death penalty. Petitioner is not claiming trial counsel failed to examine his prior convictions to determine whether the records of the prior convictions contained any potential mitigation evidence, but rather, petitioner is challenging trial counsel's performance in relation to [Defendant's] prior criminal convictions which are not before this Court. While Rompilla v. Beard, 545 U.S. 374, 125 S. Ct. 2456, 2467, 162 L. Ed. 2d (2005), found "[c]ounsel fell short ... because they failed to make reasonable efforts to review the prior conviction file, despite knowing that the prosecution intended to introduce Rompilla's prior conviction not merely by entering a notice of conviction into evidence but by quoting damaging testimony of the rape victim in that case[.]" Rompilla does not apply here. This is so because trial counsel represented [Defendant] in the cases which furnished the basis for the prior-convictions aggravating circumstance and was already familiar with the material in those files. Moreover, in the instant case, petitioner is attacking counsel's performance in relation to the convictions used as aggravating circumstances. This is not permissible in this habeas proceeding.

Nichols, 440 F. Supp. 2d at 776-77.

Based on our review of the record, we conclude that Defendant has failed to establish any tactical advantage gained by the State by delaying the resentencing hearings in the noncapital cases. Nonetheless, as the trial court found, the length of the delay was "inordinate." Accordingly, this factor will be weighed in favor of Defendant. However, the factor is not entitled to the same amount of weight or consideration as an intentional or deliberate delay purposely caused for improper purposes. State v. Hudgins, 188 S.W.3d 663, 668 (Tenn. Crim. App. 2005) (citing Wood, 924 S.W.2d at 347).

D. Prejudice

Turning to the last, and most important, factor of the Barker analysis, we conclude that Defendant has failed to show that he was prejudiced by the delay in resentencing him in the noncapital cases. Defendant does not claim that any of the concerns safeguarded by his Sixth Amendment right to a speedy trial as expressed in Barker v. Wingo were implicated as a result of the delay in resentencing. As Defendant concedes in his brief, he is currently in custody serving an effective sentence of 225 years in unrelated cases as well as a death sentence. Thus, the level of anxiety as to the length of sentence he would receive in the noncapital cases upon resentencing was, at best, negligible. Defendant was resentenced to the minimum sentence for each count of the indictment in the noncapital cases for an effective sentence of twenty-five years, and the trial court ordered Defendant to serve his sentences concurrently. Therefore, Defendant cannot claim that the delay in resentencing hindered his ability to defend himself during the resentencing hearing. Further,

the delay did not exceed the effective sentence imposed in the other noncapital cases thereby causing him to be unduly imprisoned.

Defendant also concedes that the delay in the state proceedings has not prejudiced his ability to challenge his noncapital convictions in federal court. The prejudice, however, in Defendant's view is related to what he contends was an incomplete federal review of the habeas corpus petition in his capital case. Nonetheless, as discussed above, the district court's dismissal of the issues involving the noncapital cases which were presented in the capital habeas corpus petition, as well as the Rompilla claim, was not attributed to the delay in resentencing.

Based on our review of the Barker v. Wingo factors, we conclude that Defendant has failed to show that he was prejudiced by the delay in resentencing him in the noncapital cases to the extent that the convictions should be overturned. Accordingly, having applied the four-factor balancing test set forth in Barker v. Wingo, we conclude that the defendant has failed to establish that his statutory and constitutional right to a speedy trial was violated. Defendant is not entitled to relief on this issue.

IV. Prosecutorial Misconduct

Defendant argues that the prosecutor's delay in resentencing him violated his rights of due process, pursuant to the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and Article 1, sections 8, 9, and 16 of the Tennessee Constitution. Relying on United States v. Marion, 404 U.S. 307, 92 S. Ct. 455 (1971) (finding no due process violation in delay between charges and indictment) and Rheuark v. Shaw, 628 F.2d 297 (5th Cir. 1980) (finding no due process violation in delay in appellate process), Defendant contends that due process is violated where a "delay causes substantial prejudice and is an intentional device by the State to gain a tactical advantage." The prejudice asserted by Defendant is the loss of federal review of his noncapital cases.

Concepts of due process of law found in the Fourteenth Amendment to the federal constitution and the "law of the land" clause of the state constitution require that the State in a criminal case must comport with constitutional due process notions of fundamental fairness. See U.S. Const. amend IV; Tenn. Const. Art 1, § 8; Mu'Min v. Virginia, 500 U.S. 415, 426, 111 S. Ct. 1899, 1905 (1991); Spadafina v. State, 77 S.W.3d 198, 207 (Tenn. Crim. App. 2000); State v. Chapman, 977 S.W.2d 122, 126 (Tenn. Crim. App. 1997); see also, e.g., State v. McKnight, 51 S.W.3d 559, 567 (Tenn. 2001) (general due process incorporates "fundamental principles of liberty and justice"); State v. Frasier, 914 S.W.2d 467, 470 (Tenn. 1996) (stating that general due process is a requirement of fundamental fairness).

One of the components of a due process analysis is the prejudice suffered by the defendant. See e.g. State v. Rimmer, 250 S.W.3d 12, 40 (Tenn. 2008) (holding that "[t]he defendant who asserts that the denial of a continuance constitutes a denial of due process or the right to counsel must establish actual prejudice"); Uteley, 956 S.W.2d at 495 (holding that actual prejudice must be shown

by the defendant in challenging a delay between the commission of the offense and the initiation of adversarial proceedings under due process principles); see also Sanders, 452 F.3d at 580 (concluding that a due process analysis of the delay in resentencing after the defendant's conviction was affirmed on appeal requires consideration of the reason for the delay and the prejudice suffered by the defendant as a result of the delay).

As discussed above, Defendant has failed to establish that he was prejudiced by the delay in resentencing him in the noncapital cases. Contrary to Defendant's assertion, he has not lost the ability to challenge his noncapital convictions in federal court. Also contrary to Defendant's assertion, he was extended the opportunity to present a claim of ineffective assistance of counsel in the capital case based on Rompilla v. United States. Finally, we have previously concluded that Defendant has failed to show that the State intentionally gained a tactical advantage over him as a result of the delay in resentencing in the noncapital cases. Based on our review, we conclude that the delay at issue in the case sub judice did not violate Defendant's rights to due process.

Defendant also argues generally that the delay constituted cruel and unusual punishment in violation of the Eighth Amendment of the United States Constitution. The delay, in and of itself, however, did not involve or result in excessive or unusual punishment so as to implicate the Eighth Amendment right to be free cruel and unusual punishment. See Furman v. Georgia, 408 U.S. 238, 239-40, 92 S. Ct. 2726, 2727 (1972). Defendant is not entitled to relief on this issue.

V. Eighth Amendment Challenge

Defendant argues that "the absence of federal review of the sole aggravating circumstance in his death case" results in the "arbitrary imposition of his death sentence" and "renders his death sentence cruel and usual" in violation of the Eighth Amendment of the United States Constitution and Article 1, section 16 of Tennessee's Constitution. As noted above, Defendant has not been denied federal habeas corpus review of the noncapital cases and presumably will pursue this course of action upon completion of the State appellate process.

Defendant also appears to argue for the first time on appeal that the order of the prosecution of Defendant's noncapital case and capital case violated his right of due process and equal protection. Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726 (1972). This issue challenges the imposition of the death sentence in the capital case and is thus outside the scope of this appeal. Moreover, Defendant presented this argument in the direct appeal of his capital case. See Nichols, 877 S.W.2d at 736. Our supreme court found that:

for purposes of this aggravating circumstance, the order in which the crimes were actually committed is irrelevant so long as the convictions have been entered before the sentencing hearing at which they were introduced.

Id. (citations omitted). The court concluded that "the prosecutor's decision concerning the order of prosecution of the multiple charges facing the defendant [did not violate] either equal protection

or due process.” Id. We observe that Defendant also unsuccessfully raised the issue in the federal habeas corpus petition in his capital case. Nichols, 440 F. Supp. at 735-736.

Based on the foregoing, Defendant is not entitled to relief on this issue.

CONCLUSION

After a thorough review, we affirm the judgment of the trial court.

THOMAS T. WOODALL, JUDGE